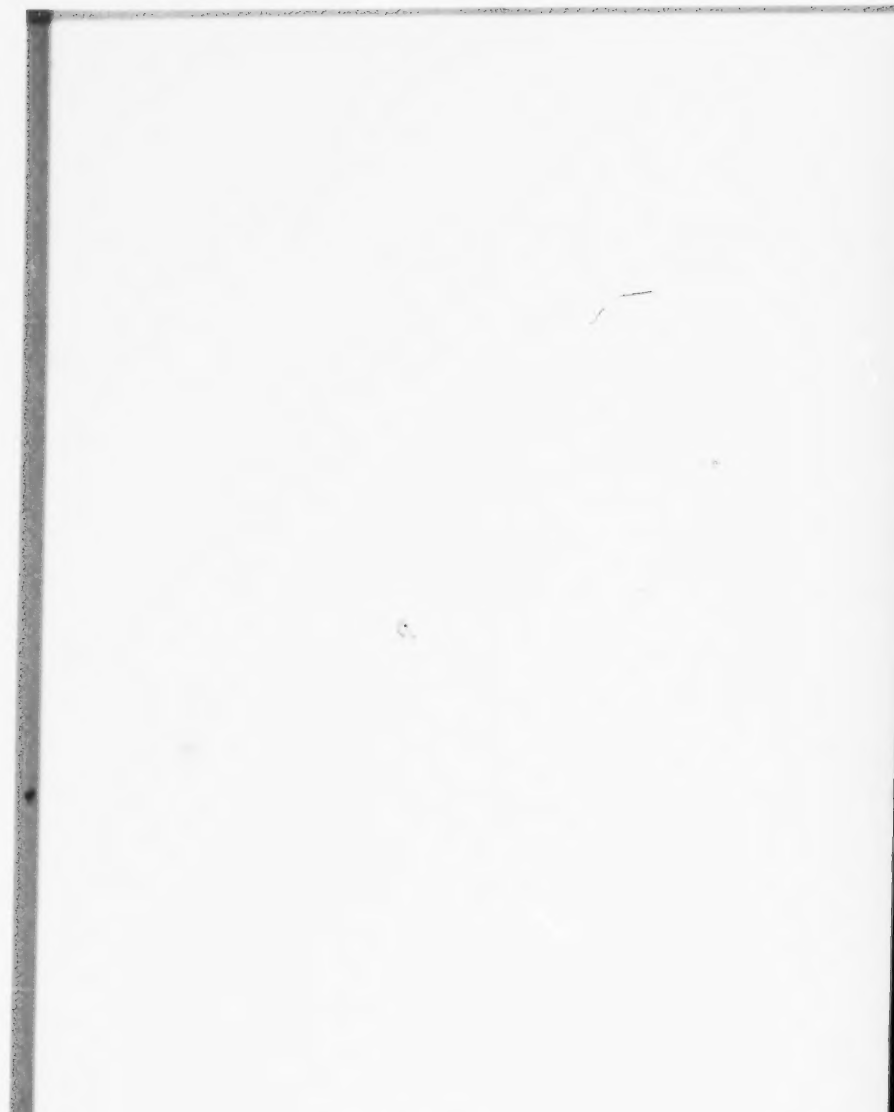

(27)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 578

HELMS BAKERIES, a corporation,

Petitioner,

vs.

STATE BOARD OF EQUALIZATION OF CALIFORNIA, FORNEY, RILEY, individually and as Members of the State Board of Equalization,

Respondents.

REPLY BRIEF OF PETITIONER

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HELMS BAKERIES, a corporation,

Petitioner and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

REPLY BRIEF OF PETITIONER.

Introduction

Your petitioner believes that all the points made by respondents are subject to answer, and therefore will briefly answer the contentions of respondents.

Answer to Statement of the Case.

(Respondents' Brief, pp. 1 and 2.)

There is no hiatus in the statement of facts. There were 370 routemen, as pleaded. However, only 200 of these purchased their food products and resold them at retail to the ultimate consumer. Obviously, the other 170 were salesmen selling for Helms Bakeries. There is and was no question involved about the sales of the 170 during the period prior to the repeal of the statute. The case deals with the sales of the 200 who purchased their bakery goods from Helms Bakeries and resold them at retail to the ultimate consumer.

Reply to Argument of Respondents.

1. The Petition Is Not Premature.

The respondents contend that the court is without jurisdiction in that the petition is premature. There is no question about the California rule that the reversal of a trial court's judgment ordinarily leaves the matter in the position "* * * as if the cause had never been tried, WITH THE EXCEPTION THAT THE OPINION OF THE TRIAL COURT ON APPEAL MUST BE FOLLOWED SO FAR AS APPLICABLE." (*Central Saving Bank v. Lake*, 201 Cal. 438, 443, quoted in respondents' brief at top of page 4. Capitalization is ours.)

An examination of the judgment of the District Court of Appeal in this case [Tr. of Rec. p. 78 *et seq.*] and the original pleadings shows that the case was one for a prohibitory injunction to prevent the forfeiture of a license, with the result that:

(a) A prohibitory injunction is denied and may not be granted on the return of the case to the lower court; and

(b) The court says the Bakery's remedy was to pay the money and then bring action for its return. Obviously this action cannot be used for that purpose as it is prerequisite that the money be deposited prior to the bringing of any action. The action is, for all purposes, therefore terminated because "* * * the opinion of the court on appeal must be followed * * *". (*Central Savings Bank v. Lake, supra.*)

The Bakery contends that the court has jurisdiction because in this case there is drawn into consideration "First, the validity of a statute (the Cal. Retail Sales Tax Act of 1933, as amended) on the ground of its being repugnant to the Constitution, and the decision of the court of last resort in California is in favor of the statute's validity, and Second, the title, right, privilege, or immunity which is specially set up or claimed by applicant under the Constitution * * *" is drawn into question. (App. Pet. for allowance of Writ p. 7.)

Such a petition for a prohibitory injunction, raising a constitutional question, is subject to review by the United States Supreme Court. Such has been the law ever since the days of Chief Justice John Marshall.

In *Plowden Weston, et al. v. The City Council of Charleston,* 2 Peters 449, 2 L. Ed. 461, a writ of error was sought to the Constitutional Court of South Carolina. The City Council of Charleston passed an ordinance to raise money for the use of the City. The ordinance taxed, among other things, stock of United States banks. In the trial court the plaintiff asked for a prohi-

bition (prohibitory injunction) to restrain levy under the ordinance. A prohibitory injunction was granted by the trial court, the City appealed to the Constitutional Court as the highest court of law in the state, to reverse the order, upon the ground that the city ordinance was not repugnant to the Constitution of the United States. This last court of the state, by a majority of the judges, decided in favor of the constitutionality of the ordinance, and held that it did not violate the Constitution of the United States. From this decision the plaintiff in the trial court, as petitioner, proceeded by writ of error to the Supreme Court of the United States. The error assigned was that the judgment of the Constitutional Court was erroneous in that it decided that the ordinance of the City Council of Charleston was not repugnant to the Constitution of the United States. Mr. Chief Justice Marshall in his opinion (pp. 463-464) points out that a doubt having arisen with respect to jurisdiction of the United States Supreme Court to consider cases of prohibition, a re-argument was requested, and that the matter was reargued on this subject. We will not here quote the decision, but it holds definitely that the Supreme Court has jurisdiction in cases of this sort. This decision on jurisdiction is still the law of the United States of America.

In *King Manufacturing Comuany v. City Council of Augusta, et al.*, 277 U. S. 100, 72 L. Ed. 801, the same question arose and the court held that a municipal ordinance sustained by the state court against the objection that it violates provisions of the Federal Constitution is within the operation of the Act of February 13, 1925, Chapter 229, U. S. C. Title 28, Paragraph 344.

It is immaterial whether the unconstitutional ordinance or usurpation of power is by a city council or any other body.

Home Telephone & Telegraph Company v. City of Los Angeles, 227 U. S. 228, 57 L. Ed. 510.

Other cases of similar effect are:

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Company, 240 U. S. 30, 60 L. Ed. 507;

The Board of Commissioners of Tippecanoe County v. Martin Lucas, as Treasurer, 93 U. S. 108, 23 L. Ed. 822.

2. Respondents' Contention That "Petitioner Did Not Show Irreparable Injury * * *" Is Not an Answer to the Petition in That (a) the Court on Appeal May Not Substitute Its Judgment as to the Facts for the Judgment of the Trial Court; and (b) There Is Other Evidence of Great and Irreparable Injury Other Than That Mentioned by the District Court of Appeal.

(a) In this case, there were portions of the complaint which were not challenged, there were stipulations of fact, and there was testimony. There was no evidence contrary to the evidence of Helms Bakeries. There was stipulated or actual evidence on all controverted points, which evidence was not in any way contradictory. Under such circumstances it is a denial of the rights of Helms Bakeries for the District Court of Appeal to substitute its judgment for that of the trial court.

In 2 *California Jurisprudence* 1028-9 (Appeal and Error, #612) we read:

"But if a judgment is amply supported by findings which are unobjectionable, findings on other issues

become immaterial, and it is not ground for reversal that such findings are unsupported by evidence, or are uncertain or otherwise defective. However unsupported or inconclusive any number of findings may be, if in any case there be at least one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded on appeal that the court rested its judgment upon that finding (or such findings) and the others will be disregarded. Moreover, any error in finding against any appellant on a particular issue is without prejudice to him, if the judgment gave him all the relief to which he was entitled had the finding been in his favor. So, also, a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial."

The sufficiency of the evidence could not be considered on appeal as the record discloses no motion for a new trial.

Myers v. Casey and Kelley, 14 Cal. 542.

(b) There was evidence in support of the findings of the trial court that there was irreparable injury and there were allegations on this point which were not denied by the answer. Referring to the complaint, it will be seen [Tr. pp. 1-2] that there were 370 salesmen, of which 170 routemen were not independent contractors; that plaintiff had on hand large quantities of raw materials which would deteriorate and spoil if not used while fresh. In paragraph III of the complaint, on page 2,

it is alleged that "plaintiff now is" a seller under the terms of the Retail Sales Tax Act. This is admitted by the answer of the State Board of Equalization, and no evidence thereon is necessary. [Tr. p. 12.] Under the pleadings it was entirely unnecessary to go into various items of sale. The testimony to which counsel for the State Board of Equalization refers was not denied, and the pleading admits Helms Bakeries has a permit as and is a retailer.

Referring further to the testimony, it will be seen on page 27 of the transcript that paragraphs I, III, IV, V and XII of the complaint were stipulated to be true. The employment of 489 men (not necessarily all selling foodstuffs) and gross sales amounting to millions being admitted, there is no evidence that the various persons who were not independent route operators were selling only food to the ultimate consumer. Furthermore, it is universally the law that a point which is not raised in the trial court may not be raised on appeal. This point that the showing of irreparable injury was lacking not having been an issue in the trial court, lack of detailed evidence thereon is consequently not properly considered by the District Court of Appeal.

Under the California Sales Tax Act a permit would be necessary to sell off the trucks owned by Helms Bakeries, of which there are at least presumably 200, which must be replaced from time to time [Tr. p. 39]. No mention is made of this in the opinion. There are, also, various other things to be worn out, such as used machinery, etc. On such sales there is a tax (*Bigsby v. Johnson, Treasurer*, 18 Cal. (2d) 860, decided October 28, 1941.) This bakery equipment of a value of $630,000 has to be replaced from time to time. Proof of this would have been put in

obviously had the respondent made any such point. It was actually made unnecessary by the stipulation [Tr. p. 51]. In the stipulation [Tr. p. 53] we read:

> "Defendants' only reason for claiming that Plaintiff is liable to pay additional sales tax is Defendants' contention that the Routemen referred to hereinabove were employees of Plaintiff, and, therefore, Plaintiff should pay a tax computed on the difference. * * * The only alleged taxes here in dispute between Plaintiff and Defendants are based on alleged sales of food products made prior to July 1st, 1935."

3. The Respondents Are in Error When They Contend That Petitioner Had a Plain, Speedy and Adequate Remedy at Law.

In this portion of their brief the respondents contend that the tax could be paid under protest and recovered by legal action. The respondents contend (Resp. Br. pp. 6-7):

> "The petitioner in the instant case was mailed notice of its denial of its petition for reassessment on December 8, 1939, and under Section 20 the assessment became final on January 7, 1940. Thus a payment could have been made and claim for refund filed on or before July 6, 1940, which was fifteen days after the complaint for an injunction was filed, and subsequent to the notice of hearing at the time of revocation."

The proved fact is that notice of re-assessment was January 14, 1938. [Complaint, Par. IX; Tr. p. 4.] Again such notice was sent on April 27, 1938, all of which was long after the repeal of the tax without a savings clause, and as to which the repealing statute specifically repealed

any right to assess after the expiration of the statute of limitations on penalties, and prior to the 1939 statute to which respondents refer. The argument of respondents, for this reason and numerous other reasons, is not tenable. The breath of life cannot be breathed into an expired right to collect a tax or to deposit and sue by subsequent change of a statute.

People v. Hochwender, 20 Cal. (2d) 181, referred to by respondent, is not in point in that the Bakery case is not within the statute. It was not a matter of an additional assessment. There never was any question of additional assessment. It goes back to the liability for the tax in the first place. In the *Hochwender* case an audit made in 1937 disclosed errors in the report as theretofore made, and consequently the Board of Equalization mailed a notice of additional assessment. In the instant case the original report was and is correct, and the section with respect to re-examination of the books and re-assessments and the attempt to collect a re-assessed amount so found to have been the result of intentional or unintentional misleading of the State Board of Equalization by a taxpayer, is not the point.

4. The Contention That the Board of Equalization Followed the Proper Statutory Proceeding Is Not in Point.

Petitioner contends in its petition for the writ and supporting brief that the statute of limitations had run on any right to forfeit the Retail Sales Tax Permit, and that the State Board of Equalization may not forfeit its permit until and unless it has been judicially determined that there is an indebtedness. We submit that under the case of *Laisne v. Cal. State Board of Optometry,* 19 Cal. (2d)

831, revocation requires an adjudication by the court. The State Board of Equalization is not given by the Constitution of the State of California any power to make any such determination. The statute of limitations assessing any penalty whether one year or three years, has expired, and the Board of Equalization is taking upon itself authority which belongs to a court. It is possible that machinery might have been set up in the State Board of Equalization permitting a hearing on such points, but neither the California Constitution or the Sales Tax Act sets up any such machinery, or grants any such right.

The case of *City of Chicago v. Kirkland*, 79 Fed. Rep. (2d) 963, cited by the Board, holds that the Mayor of Chicago could pass upon the facts of a violation of a Municipal Ordinance preliminary to review or legislative action. However, in the case before the Supreme Court here, the question is one of law, *i. e.*, whether the Constitution has given the Administrative Board judicial authority to hold a hearing, and if so, whether or not the time has lapsed in which to forfeit for the alleged violation. The *Kirkland* case does not discuss the constitutional or statutory authority under which the Mayor revoked the license. It holds (p. 966):

> "Thus it is clear that the only question legitimately before us is whether, in the present instance, the mayor acted upon evidence which would justify a finding of violation of the ordinances of Chicago by appellees. * * * *We may inquire only as to whether he acted arbitrarily.*" (Italics ours.)

The Board of Equalization obviously acted arbitrarily and the Bakery so contends.

5. The Findings of the Trial Court Are Effective.

One cannot stipulate to a matter or fail to put in evidence thereon without being bound by the trial court's decision.

> "He who consents to an act is not wronged thereby."
>
> *Cal. C. C.* 3515.

> "Acquiesence in error takes away the right of objecting to it."
>
> *Cal. C. C.* 3516.

Counsel for the Board goes outside the record to say (p. 10) that in its opening brief to the California District Court of Appeal the Board atacked each of the findings to which we refer. Such is not the case and the Appellate Court did not pass thereon.

6. The State Board of Equalization Is a Stautory Body and Its Rights With Respect to Collection of Taxes Are Given It by Statute. It Has Only Those Rights Given by Statute.

Counsel for the Board tries to make a point of the fact that Section 26 of the Retail Sales Tax Act "provides several other methods of collection, such as writ of execution issued upon an administrative 'judgment', warrant of distraint and seizure and sale". It allowed the Attorney General to "pursue any remedy hereunder * * *". This is immaterial. The remedy of collection by forfeiture is not given under Section 26. Hence, without legal adjudication of indebtedness, and after the statute of

limitations has run, revocation is not a remedy allowed to the Board.

Seaboard Acceptance, etc. v. Shay, as Sheriff, etc., 214 Cal. 361, 365-6;

Laisne v. State Board of Optometry, 19 Cal. (2d) 831, 834-5.

7. Section 16 of the Retail Sales Tax Act Is Unconstitutional.

The effect of the *Laisne* case referred to on page 12 of the respondents' brief, is that the revocation of the Bakery's Permit is not constitutional without court action. Reviewing that case, we see that the State Board of Optometry is given certain powers. The powers and duties of the Board are set forth in the Business and Professions Code. Thus, in Section 3024 the Code states:

> "The board may grant or refuse to grant certificates of registration as provided in this chapter and *may revoke or suspend the certificate of registration of any optometrist for any of the causes specified in this chapter.*
>
> "It shall have the power to administer oaths and to take testimony in the exercise of these functions." (Italics ours.)

Section 3025 (all the sections to which we refer are in the same chapter) of the code states:

> "The Board may make and promulgate rules and regulations governing procedure of the board, the admission of applicants for examination for certificates of registration as optometrists, and the practice of optometry."

Referring now to the Retail Sales Tax Act of 1933, which expresses the statutory powers of the Board of Equalization to revoke permits, we find only Section 16 of the Act which provides that if the holder fails to comply with any of the provisions of the Act (the statute does not say "If in the judgment of the Board the holder, etc.") or any of the rules and regulations by the Board prescribed or adopted under the Act, the Board may, upon ten days' notice in writing, hold a hearing requiring the holder to show cause why his permit should not be revoked, and may revoke or suspend the permit. Furthermore, under the *Laisne* decision—no constitutional judicial authority has been given to the Board. Its authority is merely ministerial, and has been exceeded. It cannot pass on disputed questions. The questions involved in the Helms Bakeries revocation were ones for judicial determination, and wholly outside any authority given to the Board of Equalization, whether or not the *Laisne* decision is taken into consideration.

Counsel for the respondents contends that (p. 13) "* * * petitioner had notice of the assessment of the tax and a hearing thereon, it had notice of the intention to revoke its license for nonpayment of the tax and a hearing on that question". Any such notice by one having no authority to so act is not notice at all, and of no value. For instance, should a Recorder's Court, or any other court than one of general jurisdiction, decide to proceed against and try a citizen for murder, any alleged process issued by it in connection wth such a matter entirely beyond its jurisdiction would not be due process, and it would not be necessary to pay any attention thereto. If it proceeded to enter a judgment of death and to put it into execution, then, of course, its action could and

would be reviewed, and would be found to be in excess of the power of such a court of limited jurisdiction. This illustration may not be the best possible, but shows the fallacy of the reasoning of the respondents.

Counsel for the respondents contends that the case of *Fidelity & Deposit Co. v. Tafoya,* 270 U. S. 434, is not pertinent. We contend that it is. It recites a broad principle, which is highly important. In that case the Corporation Commissioners of the State of New Mexico proposed to forfeit a charter in violation of constitutional rights granted under the United States Constitution. Their method of procedure was in accord with the New Mexico law. They were restrained. Mr. Justice Holmes stated in the opinion (page 43 of our brief):

> "Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The State of California by proper procedure for cause may revoke permits, but may not use the forfeiture method in violation of constitutional rights. Unless the Supreme Court grants the writ of certiorari and reverses the District Court of Appeal of the State of California (whose decision the Supreme Court of California refused to review), the Board of Equalization of the State of California will, not only in the case of Helms Bakeries, but in nu-

merous other cases, use its so-called right of forfeiture "* * * as a part of a scheme to accomplish a forbidden result". (*Fidelity and Deposit Co. v. Tafoya, supra.*) Other states will follow the lead and the result will be government by threat, forfeiture of existence and arbitrary rule instead of a constitutional democracy.

Conclusion.

For the reasons stated, we respectfully request the United States Supreme Court to take jurisdiction, issue a writ of certiorari to the District Court of Appeal of the State of California, and after reviewing the decision, reverse the same—thus avoiding much further litigation and preserving the constitutional rights of millions of citizens who are by law required to have permits, and conduct the business on which they, their employees and many more rely, under the supervision of Administrative Boards.

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